

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0759, State of New Hampshire v. Michael McCarthy, the court on December 5, 2005, issued the following order:

Following a jury trial, the defendant, Michael McCarthy, was convicted on alternative counts of attempted aggravated felonious sexual assault, *see* RSA 632-A:2 (Supp. 2003) (amended 2003); RSA 629:1 (Supp. 2005); and endangering the welfare of a child, *see* RSA 639:3, III (Supp. 2005). On appeal, he contends that the trial court erred in denying his motion for mistrial and in allowing the introduction of a prior consistent statement to rehabilitate the victim's credibility. We affirm.

Mistrial is the proper remedy only if the evidence in question was not merely inadmissible, but also so prejudicial that it constituted an irreparable injustice that could not be cured by jury instructions. *State v. Carbo*, 151 N.H. 550, 554 (2004). The trial court is in the best position to determine what remedy will adequately correct any prejudice; absent an unsustainable exercise of discretion, we will not overturn its decision. *Id.*

In his renewed request for a mistrial, the defendant cited two examples of testimony that might have led to speculation that a prior uncharged assault had occurred. Following the first question, the trial court instructed the jury not to consider the question or the answer. After the response of a second witness, the trial court specifically instructed the jury to disregard the testimony and "that there was in fact in this case no prior incident." This specific instruction did not leave open to speculation by the jury whether a previous incident had occurred. *Cf. Carbo*, 151 N.H. at 554 (setting forth trial court's curative instruction to jury). Accordingly, we find no error in the trial court's denial of the defendant's motion for a mistrial.

The defendant also argues that the "sheer number of curative instructions essentially eliminated their efficacy." We will assume without deciding that this issue has been preserved for our review. This is not a case where the curative instructions were required after continued, repeated improper conduct by the prosecutor; *see State v. Bujnowski*, 130 N.H. 1, 6 (1987); *Border Brook Terrace Condo. Assoc. v. Gladstone*, 137 N.H. 11, 16-18 (1993); or where the inadmissible evidence was odious, *see State v. Pelkey*, 145 N.H. 133, 137 (2000). Having reviewed the record, we conclude that any cumulative prejudicial effect of the inadmissible testimony did not require a mistrial. *See Border Brook*, 137 N.H. at 16.

The defendant also contends that the trial court erred in admitting a prior consistent statement made by the victim for the non-hearsay purpose of rehabilitating her credibility because the statement was made at a different time in a different conversation. Even if we assume without deciding that the trial court erred in admitting the statement, we conclude that any error was harmless. See State v. Velez, 150 N.H. 589, 594 (2004) (error is harmless if State proves beyond a reasonable doubt that verdict was not affected by erroneous admission). The statement was neither lengthy nor directly related to a determination of the guilt or innocence of the defendant. See State v. Pelletier, 149 N.H. 243, 254 (2003). In contrast, the victim's testimony about the assault was direct and specific. Other witnesses presented corroborating testimony about the victim's emotional state in the hours following the assault. Based upon the record before us, we conclude that the State has satisfied its burden of proving beyond a reasonable doubt that any error in admitting the statement was harmless.

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**